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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1230

JOSEPH ABODEELY,
Appellant,

v.

THE PEOPLE OF THE STATE OF IOWA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

IN RESPONSE TO APPELLANT'S APPEAL FROM THE SUPREME COURT OF IOWA

APPELLEE'S MOTION TO DISMISS

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OPINION BELOW

The appellant seeks an appeal of a decision by the Iowa Supreme Court rendered on September 2, 1970, captioned, *State of Iowa v. Joseph George Abodeely,* which decision affirmed appellant's lower court plea of guilty to the crime of aiding and abetting an attempt to produce an abortion. Said decision may be found in 179 N.W.2d 347 (Iowa 1970).

JURISDICTION

Appellant claims jurisdiction for Review by the Supreme Court of the United States arises under Title 28, United States Code, Section 1257(2).

QUESTIONS PRESENTED

The appellant asks this Court to consider the following questions:

1. Whether the statute under which the appellant was convicted which forbids any person from producing a miscarriage of a woman unless necessary to safe life is contrary to the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States as being constitutionally vague and indefinite and contrary to the Ninth Amendment to the Constitution of the United States of America as infringing upon a woman's right to life and bear children.

2. Whether the trial court's failure to inform the appellant of his constitutional rights required by *Boykin v. Alabama,* 395 U.S. 238 (1969) and *McCarthy v. United States,* 394 U.S. 459 (1969) in a post *Boykin* guilty plea violated the appellant's rights under the due process clauses of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States.

3. Whether the appellant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States were violated when he was charged with a felony by a county attorney's information and without presentment for indictment to a grand jury.

STATUTES INVOLVED

Iowa Code, Section 701.1:

> "If any person, with intent to produce the miscarriage of any woman, wilfully administers to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and be fined a sum not exceeding one thousand dollars."

Iowa Code, Section 769.2:

"The county attorney may, at any time when the grand jury is not actually in session file in the district court an information charging a person with an indictable offense. . . ."

STATEMENT OF THE CASE

On October 24, 1968, the appellant was charged by county attorney's information in Linn County, Iowa, with the crime of Attempt to Produce Abortion in violation of Section 701.1, 1966 Code of Iowa. On June 12, 1969, the appellant appeared in open court in the presence of his attorney and entered a plea of guilty. Sentencing hearing was set for July 7, 1969, and on that date, after testimony was taken, the sentencing hearing was recessed until July 24, 1969, at which time more testimony was taken and the appellant was sentenced for an indeterminate period of time not to exceed five years in the Iowa State Penitentiary, Fort Madison, Iowa, and to pay a fine of One Hundred (100) Dollars and costs of the prosecution. Subsequently, a Motion in Arrest of Judgment and to Vacate the Sentence was filed by appellant's attorneys, and overruled.

Appellant then appealed his case to the Supreme Court of the State of Iowa and on September 2, 1970, the Iowa Supreme Court issued its opinion affirming the appellant's conviction.

ARGUMENT

I.

The first question raised by the appellant before this Court relates to the constitutionality of the Iowa abortion statute. The appellant was charged with a violation of Section 701.1, 1966 Code of Iowa which provides:

"If any person, with intent to procure the miscarriage of any woman, wilfully administers to her any

> drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and fined a sum not exceeding one thousand dollars."

The appellant's case in the lower court was, to say the least very unique. To begin with this is not a case wherein a medical practitioner was charged with the crime of abortion but rather a situation where a nightclub proprietor was charged. Also there was no jury trial in the instant case, but rather a plea of guilty to the charge—a plea which was entered approximately seven and one half months after the appellant was charged and during which time appellant was represented by two competent attorneys who employed a variety of pre-trial tactics with respect to attempting to find a defense to the charge. Apparently being unsuccessful in their efforts, the appellant decided to enter a plea of guilty.

On appeal to the Iowa Supreme Court the Appellant attacked the constitutionality of the Iowa abortion statute on two grounds: (1) that it was unconstitutional for vagueness, citing nothing more than the case of *People v. Belous,* 458 P.2d 194, and (2) that the Iowa abortion law is unconstitutional because it is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The appellee would respectfully request this Court to dismiss the appellant's appeal relative to the issue of the constitutionality of the Iowa abortion law for several reasons.

To begin with, the facts in this case do not support the rather limited constitutional arguments advanced by the appellant in the Iowa Supreme Court. The appellant challenged the Iowa abortion as being unconstitutional on the grounds of vagueness. However, such law was not vague as to the appellant. The law was designed to prohibit the attempt of persons such as the appellant, *who are not med-*

ical practitioners, from aiding and abetting in the procurement of abortions.

A similar situation was presented to the Vermont Supreme Court in the case of *State v. Bartless,* 270 A.2d 168 (Vermont 1970) wherein the appellant was charged and convicted of assisting in the procurement of an abortion. The Vermont statute, which is similar to the Iowa statute was held constitutional and the Vermont court concluded that under the facts of the case the appellant did not suffer by any theoretical vagueness in the statute, and the statute was not unconstitutional as to him as for the possible overbroad application of the statute to physicians and pregnant women, the Vermont Court stated in would deal only with the case at hand and not with hypotheticals.

The appellee would submit that the facts in the above-mentioned Vermont case are quite similar to the case at bar and the reasoning of the Vermont Court should control in the instant case.

The appellant also claims that the Iowa anti-abortion law is unconstitutional on the grounds that it is an unwarranted invasion of the privacy and infringement upon a woman's right to life and bear children. However, the appellant did not raise this issue in the Iowa Supreme Court and the Court did not pass on this issue.

This Court has repeatedly held that only the constitutional issues raised in the lower courts can be before the Supreme Court on appeal. *Shelley v. Kraemer,* 334 U.S. 1; *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430; *Monks v. New Jersey,* 398 U.S. 71; *Street v. New York,* 394 U.S. 576.

II.

The second question raised by appellant before this Court relates to the validity of his plea of guilty to the crime charged. Appellant contends that the trial court failed to comply with the requirements of *McCarthy v. United States,* 394 U.S. 459 and *Boykin v. Alabama,* 395 U.S. 238, in ac-

cepting his plea of guilty, and thus appellant's rights under the due process clauses of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States were violated.

McCarthy v. United States, supra, dealt with Rule 11 of the Federal Rules of Criminal Procedure relative to guilty pleas and laid down certain guidelines for accepting guilty pleas. However *McCarthy* limited itself to federal procedural problems and was not binding upon state courts. On June 2, 1969, this Court rendered its decision in *Boykin v. Alabama, supra,* which requires that in all pleas of guilty in state courts the record must disclose that the defendant voluntarily and understandably entered his plea of guilty. It must be shown that the defendant knew he was waiving the privilege against self-incrimination, the right to trial by jury and the right to confront one's accusers.

On June 12, 1969, ten days after the *Boykin* decision was rendered, the appellant appeared in the District Court of Iowa in and for Linn County, Iowa, and entered his plea of guilty. From a reading of the Record in this case it is patently clear that the requirements of *Boykin* were complied with relative to appellant's plea of guilty.

On October 24, 1968, the appellant was charged with the crime of Attempt to Produce Abortion in violation of Section 701.1, 1966 Code of Iowa. Appellant did not plead guilty to the above charge until June 12, 1969, after many and varied legal tactics on the part of two attorneys representing him. The Iowa Supreme Court, in considering the validity of the appellant's ultimate plea of guilty in the trial court noted in its decision at 179 N.W.2d at page 352:

> "Defendant is 38 years old; a high school graduate with three years of college training; an experienced business man of at least eight years. Parts of his business interests could at best be said to be operated on the fringes of the law. He had pled guilty to bootlegging. He knew Meyers had been tried to a jury and convicted. He knew Geater had pled guilty.

> He had numerous conferences with his two competent attorneys, he had been present at hearings on motions for continuance, for a bill of particulars, to inspect evidence and for a change of venue. The latter hearing involved the use of affidavits and testimony of witnesses."

The Iowa Supreme Court, after carefully reviewing the Record in the lower court found ample evidence that the appellant knew he had a right to a jury trial and knew he was waiving such a right when he pled guilty; the appellant knew of his Fifth Amendment right to keep silent; the appellant knew he had a right to face his accusers.

From a careful reading of the Record in this case it is clear that the trial court took every precaution to determine that appellant's plea was voluntary and intelligently made. The court questioned the appellant at great length prior to accepting his plea of guilty on June 12, 1969. The court informed the appellant of the crime charged and punishment thereof (R. p. 4, 11. 28-33). The court asked the appellant if his plea was voluntary (R. p. 5, 11. 9-13). The court asked if there was any inducement or coercion placed upon the appellant to so plead (R. p. 5, 11. 14-16). The court asked the appellant if he had an opportunity to fully and completely discuss this matter with his attorneys and if he was satisfied with their representation (R. p. 5, 1. 33 to p. 6, 1. 5). The Court explained the nature of the charge to the appellant and to take some more time to confer with his attorneys (R. p. 6, 1. 6 to p. 7, 1. 12). Having determined through careful questioning that appellant's plea was voluntary, the court finally accepted his plea of guilty (R. p. 7, 11. 23-24).

On July 7, 1969, at the appellant's sentencing hearing the court again asked the appellant if he wished to reaffirm his plea (R. p. 46, 1. 32 to p. 47, 1. 2). At the July 24th sentencing hearing, the court again questioned the appellant concerning his guilty plea (R. p. 48, 1. 2 to p. 49, 1. 12).

From the questioning that transpired between the court and the appellant and his attorneys it is quite clear that the court was concerned about protecting the rights of the appellant regarding his guilty plea and in the words of *Boykin*, wanted an "affirmative showing that it [plea of guilty] was intelligent and voluntary." Furthermore, at the appellant's hearing on appellant's Motion in Arrest of Judgment, the trial court again inquired into the voluntariness and intelligence of appellant's guilty plea and concluded that it did meet the existing legal standards.

From the aforegoing it is patently obvious that the appellant was aware and informed of constitutional rights at the time he plead guilty and the requirements of a valid guilty plea in state courts, enunciated by the Court in *Boykin v. Alabama, supra,* were complied with. Therefore, no controversy exists under Title 28, United States Code, Section 1257, and because of such, this Court should dismiss appellant's appeal.

III.

The third question appellant seeks to present before this Court is whether his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States were violated when he was charged by a county attorney's information instead of by grand jury indictment. The Iowa Supreme Court answered the above question in the negative and was perfectly correct in so holding.

Section 769.2 of the Iowa Code provides in pertinent part:

> "The county attorney may, at any time when the grand jury is not actually in session, file in the district court an information charging a person with an indictable offense . . . ."

At the time the appellant was charged with the crime in question, the Linn County, Iowa, Grand Jury was not in session. Therefore, the County Attorney of Linn County,

Iowa, charged the appellant by a county attorney's information pursuant to the above quoted statute.

Appellant in seeking an appeal to this Court alleges that the Iowa Supreme Court erred in sustaining the validity of prosecution by county attorney's information pursuant to Section 769.2 of the Iowa Code and requests this Court to declare the aforementioned statute unconstitutional, claiming it to be repugnant to the Fifth and Fourteenth Amendments of the Constitution of the United States.

In support of the above contention appellant cites the cases of *Baron v. The Mayor and City Council of Baltimore,* 7 Pet. 243, 8 L. ed. 672 (1883) and *Benton v. State of Maryland,* 395 U.S. 784 (1969). However, neither of these cases deal with the issue of prosecution by county attorney's information as opposed to grand jury indictment, but rather deal with Fifth Amendment safeguards against taking private property for public use without just compensation and the question of double jeopardy, respectively.

The right of a state to prosecute a felony charge on the basis of an information drawn and filed in conformity with state law is clearly established. *Hurtado v. California,* 110 U.S. 516; *Eilenbecker v. District Court of Plymouth County,* 134 U.S. 31; *Wessling v. Bennett,* 410 F.2d 204; *Moore v. Henslee,* 276 F.2d 876; *State v. Cooper,* 344 S.W. 2d 72 (Mo. 1961) cert. den. 368 U.S. 855; *Kotel v. Bennett,* 255 Iowa 984, 124 N.W. 2d 710, appeal dismissed and certiorari denied, 376 U.S. 188.

Thus, there is no support for appellant's contention that his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States were violated when he was charged with a felony by a county attorney's information instead of being indicted by a grand jury, and such contention is totally without merit.

The United States Supreme Court stated in *Hurtado v. California,* 110 U.S. 516, that the use of a California prosecutors information was held not to violate the Fifth

Amendment to the United States Constitution. It is essential to the jurisdiction of the Supreme Court under Title 28, United States Code, Section 1257, that a federal question have been properly raised in the state court proceedings. However the question raised by the appellant relative to the constitutional validity of a county attorney's information has been explicitly foreclosed by this Court in *Hurtado v. California, supra,* and because of this, no real controversy exists. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311. A federal issue not meeting the standards of Section 1257 is deemed unsubstantial and is cause for dismissal of an appeal. *Zucht v. King,* 260 U.S. 174; *Palmer Oil Corp. v. Amerada Corp.,* 343 U.S. 390.

CONCLUSION

Wherefore, for the aforegoing reasons we respectfully request this appeal be dismissed.

Respectfully submitted,

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